

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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February 2, 2021

Opposition No. 91250143

*Theragun, LLC*

*v.*

*Theragen, Inc.*

**M. Catherine Faint,  
Interlocutory Attorney:**

The Board notes Applicant's motion, filed January 29, 2021, to strike rebuttal declarations of Kevin Tsao and Dr. Jason Wersland.<sup>1</sup> Applicant objects that the declarations are improper rebuttal and/or the witnesses were never disclosed.

It is the policy of the Board not to read trial testimony or examine other trial evidence prior to final decision. *See* TBMP §§ 502.01 and 532 (2018). Thus, if a motion to strike cannot be resolved simply by reviewing the face of the notice of reliance and attached documents, but instead would require a review of testimony or other evidence, determination of the motion will be deferred by the Board until final hearing. *See Kate Spade LLC v. Thatch, LLC*, 126 USPQ2d 1098, 1101 (TTAB 2018); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1239 n.32 (TTAB 2015); *M-Tek Inc. v. CVP Systems Inc.*, 17 USPQ2d 1070, 1073 n.2 (TTAB 1990). *See also*

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<sup>1</sup> Applicant's main brief was filed on the same date.

*Carl Karcher Enters., Inc. v. Carl's Bar & Delicatessen, Inc.*, 98 USPQ2d 1370, 1371 n.2 (TTAB 2011) (substantive objections to specific documents or exhibits introduced by testimony of opposer's witness as being beyond scope of disclosure deferred to disposition at final decision)

In view thereof and because review of the declarations and included documents may be required for determination of the motion, determination of Applicant's motion to strike is **deferred** until final hearing.

Trial dates remain as set.

The Federal Rules of Evidence generally apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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